No. 01-287

IN THE

Supreme Court of the United States

EMILY ADLER, *et al.*,

Petitioners,

V.

DUVAL COUNTY SCHOOL BOARD, *et al.*,

Respondents,

V.

SUSAN BOLES, *et al.*,

Respondents-Intervenors.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS-INTERVENORS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a neutral policy that allows a student volunteer elected by the graduating senior class to deliver a message at the beginning and/or conclusion of the graduation ceremony, which message is not pre-reviewed, censored, edited, or directed by school officials and which message can be secular or religious in nature, is constitutional on its face.

2. Whether an injunction requiring school officials to censor all religious content of a message given by a volunteer student of the senior class during a high school graduation ceremony at a time and place where uncensored, student-initiated, student-led, secular speech is permitted violates the Establishment Clause.

3. Whether an injunction requiring school officials to censor all religious content of a message given by a volunteer student of the senior class during a high school graduation ceremony at a time and place where uncensored, student-initiated, student-led, secular speech is permitted violates the student's right to freedom of speech.

4. Whether an injunction requiring school officials to censor all messages with a religious viewpoint on an otherwise includable topic given by a volunteer student of the senior class at a high school graduation ceremony violates the student's right to freedom of speech.

PARTIES

The Petitioners consist of past and current students of various schools within the Duval County School District, and they include the following: Emily Adler, Bonnie Bear, Aaron Finck, Benjamin Finck, Rachel Finck, Seth Finck, Tyler Hurley, Monica Juodvalkis, Lucy Nord, Roberta Nord, Jonathan Rand, and Joshua Weihnacht.

There are two categories of Respondents. The Respondents include the Duval County School Board and the Duval County Public School District.

The Respondents also include various student-intervenors who attend schools within the Duval County Public School District. These students and parents moved to intervene as Defendants-Intervenors and are listed below before the Eleventh Circuit Court of Appeals as Movants-Intervenors and herein as Respondents-Intervenors. These Respondents include Susan Boles, Ronald Boles, Rebecca Boles, Mark Muhlbauer, Kenneth Carkhuff, Karlene Carkhuff, Ashton Carkhuff, Stan Carter, Susan Carter, Sarah Carter, Mark Sciullo, Jody Sciullo, Moriah Sciullo, Nicholas Sciullo, Douglas Pigg, Charlotte Pigg, Jonathon Pigg, and Tim Howard.[1]

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[1] Petitioners' Petition for Writ of Certiorari listed the Respondents-Intervenors in a footnote. However, the undersigned has represented student-intervenors in this case since the 1993 initial cause of action and the student-intervenors through the undersigned presented arguments on the merits in the present cause of action before the Eleventh Circuit Court of Appeals in 1998 and again before the *en banc* panel in 1999. The *en banc* panel of the Eleventh Circuit Court of Appeals requested the Respondents-Intervenors to address two substantive questions addressed on appeal, namely whether the Guidelines on their face violated the Establishment Clause and whether injunctive relief is a workable remedy under the facts of this case. Respondents-Intervenors then filed their supplemental brief with the Eleventh Circuit following this Court's remand.

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STATEMENT OF THE CASE

This case involves a facial challenge to certain Guidelines within the Duval County Public School District (hereafter "Board") which address student-initiated, student-led messages at graduation ceremonies in Duval County. In the spring of 1993, Larry Zenke, Superintendent of Schools for Duval County, asked Vicki R. Reynolds, Duval County School Board's Liaison for Legal Affairs, to look into the issue of student messages during graduation ceremonies by consulting with the General Counsel's Office. Ms. Reynolds initiated a legal request to the General Counsel's Office and received a legal opinion from that office in April, 1993. This opinion took the policy approved by the Fifth Circuit in *Jones v. Clear Creek Independent School District*, 977 F.2d 963 (5th Cir. 1992), and made it neutral. Based on that opinion, Ms. Reynolds issued the memorandum of May 5, 1993, to all high school principals. That memorandum (hereafter "Guidelines") states in pertinent part:

> 1. The use of a brief opening and/or closing message not to exceed two minutes, at high school graduation exercises, shall rest within the discretion of the graduating senior class;
>
> 2. The opening and/or closing message shall be given by a student volunteer, in the graduating senior class, chosen by the graduating senior class as a whole;
>
> 3. If the graduating senior class chooses to use an opening and/or closing message, the content of that message shall be prepared by the student volunteer and shall not be monitored or otherwise reviewed by Duval County School Board, its officers or employees;

The purpose of these Guidelines is to allow the

> students to direct their own graduation message without monitoring or review by school officials.

Ms. Reynolds testified that it was not her intent for the Guidelines to mandate student-led messages at graduations. Dr. Zenke testified that he did not have a purpose to violate the Constitution, to establish prayer or to favor prayer over any other message students might give. Dr. Zenke also stated that it would be inappropriate and impossible to prohibit or encourage prayer, because there is no prior review of the student messages.

On June 1, 1993, at the Board meeting, school board member Cheryl Donelan moved to have a moment of silence at graduation ceremonies in lieu of the suggested Guidelines. The motion failed by a vote of four to three. At least three school board members stated that they rejected Donelan's proposal in order to avoid a school mandated moment of silence. The Board members clearly desired to avoid the establishment of religion. Dr. Zenke stated that the Board was required to have a "hands off policy . . . to allow students to have their own message to communicate to fellow students." Dr. Zenke stated further that "students ought to have a very critical and whole role in that [graduation] program, both in planning and carrying it out."

In addition, school board members stated that the purpose and effect of the Guidelines was to allow the students to have free speech. Dr. Zenke stated, "I think the staff was trying to get clarification as to the latitude that students have in the issue as it relates to the first amendment." The content of the message is decided by the student.

In *Adler v. Duval County School Board.*, 851 F. Supp. 446 (M.D. Fla. 1994), *aff'd in part, vacated in part, and remanded in part*, 112 F.3d 1475 (11th Cir. 1997) (hereafter "*Adler I*"), the District Court found that

> while the Reynolds' memorandum of May 5 was not itself the subject of any specific vote by the

> Board, that memorandum was left in force with the acquiescence or tacit approval of the Board as its official policy governing the 1993 commencement exercises.

In early June 1993, following the Board meeting, the original Plaintiffs, consisting of three graduating seniors from Mandarin High School and a parent of a graduating senior, brought an action seeking to enjoin the Board from *permitting* student-initiated, student-led messages containing religious content at the 1993 public high school graduation ceremonies. These Plaintiffs also sought declaratory relief and damages. The undersigned counsel of record represented a separate group of students who were granted leave to intervene to oppose the claims of these original Plaintiffs and assert their own First Amendment rights of free speech and free exercise of religion at graduation ceremonies. In *Adler I*, on June 4, 1993, after a hearing in open court, the original Plaintiffs' Motion for Preliminary Injunctive Relief was denied. A renewed Motion for Injunctive Relief was also denied by written Order entered the following week. On January 3, 1994, the original Plaintiffs filed a motion for class action determination in this case asserting that the interests involved affected students in all high schools throughout Duval County. On January 19, 1994, the Motion for Class Action Certification was denied as untimely.

The 1993 graduation ceremonies at the seventeen high schools within Duval Country School District were conducted according to the Guidelines. The District Court found that the high school principals delegated decision-making authority to graduating senior students at each school to determine whether student messages should be given at the opening and/or closing of the graduation exercises. The District Court found:

> At ten of the seventeen high schools, it is undisputed that the students opted for messages that constituted various forms of religious prayer. At the remaining seven schools, however, it appears that either no messages were given at all, or that any that were given were entirely secular, having no religious aspects.

Adler, 851 F. Supp. at 449-50.

In *Adler I*, all parties, including the student-intervenors, moved for Summary Judgment, and on May 4, 1994, the District Court denied the original Plaintiffs' motion and granted the Board's and the Intervenors' Motions. Judgment was entered in favor of the Defendants and the Intervenors and against Plaintiffs. The District Court found that the Guidelines did not violate the Establishment Clause under *Lemon v. Kurtzman*, 403 U.S. 602 (1971) or under *Lee v. Weisman*, 505 U.S. 577 (1992). The District Court also ruled that the graduation policy created a limited public forum for student messages, and to censor the religious content of said messages would violate the student-intervenors' right to free speech protected under the First Amendment.

The Plaintiffs in *Adler I* appealed the ruling. The undersigned counsel of record, on behalf of the Intervenors, argued before the Eleventh Circuit Court of Appeals in 1995, and again in 1996, after the Court of Appeals requested the case be reargued. On May 6, 1997, the Eleventh Circuit Court of Appeals affirmed in part, vacated in part and remanded the case to be dismissed because the Plaintiffs had graduated. *See Adler v. Duval County Sch. Bd.*, 112 F.3d 1475 (11th Cir. 1997) (hereafter "*Adler II*"). The Court found the damages claim had not been properly preserved, thus making the case moot.

This case now readdresses the same Guidelines challenged in *Adler I*. The complaint in this action was filed on Friday, May 15, 1998. The current Plaintiffs are new students who were not part of the decision in *Adler I*. Emily Adler is the sister of Karen Adler. Thus, the present case has the same name as the original matter. On May 27, 1998, the Respondents-Intervenors filed a Motion to Intervene with supporting memorandum of law and attached affidavits of student- intervenors. On May 27, 1998, the District Court heard argument on Plaintiffs' Motion for Preliminary Injunction. At the hearing, all parties agreed that the facts of the case remained the same, that all of the evidence submitted in the *Adler I* case be made a part of the present proceeding,

and all agreed that the case on the merits be advanced and consolidated with the hearing on the preliminary injunction under Fed.R.Civ.P. 65(a)(2). On May 27, 1998, the District Court entered an Order denying Plaintiffs' Motion and adopted the reasoning in *Adler I*. Also on May 27, 1998, the District Court entered an Order denying the Respondents-Intervenors' Motion to Intervene, stating the Intervenors' Motion to Intervene was "DENIED AS MOOT given the entry of the contemporaneous Order denying the application for preliminary injunction and directing the entry of judgment." On May 29, 1998, the Intervenors filed a Motion for Reconsideration of the District Court's denial of intervention requesting reconsideration of the District Court's May 27, 1998, Order denying intervention. On May 29, 1998, the District Court denied the Motion without prejudice to the right to be heard before the Eleventh Circuit Court of Appeals. On May 28, 1997, Plaintiffs filed their appeal. On June 1, 1998, Respondents-Intervenors joined in the appeal. Plaintiffs and Respondents-Intervenors also filed Emergency Motions requesting an expedited appeal. On June 9, 1998, the Eleventh Circuit Court of Appeals granted an expedited appeal and consolidated the Respondents-Intervenors' case (Case No. 98-2720) with the Plaintiffs' appeal (Case No. 98-2709).

In November of 1998, this matter was again argued for the third time before the Eleventh Circuit Court of Appeals. On May 11, 1999, the Eleventh Circuit, in a 2 to1 decision, found the Guidelines unconstitutional, in part because the Court ruled that students became state actors whenever they entered the graduation podium. On behalf of the Respondents-Intervenors, the undersigned counsel of record, along with the Board, filed separate Motions for Rehearing *en banc* which were granted on June 3, 1999, thus vacating the decision and setting the case for *en banc* oral argument. *See Adler v. Duval County Sch. Bd.*, 174 F.3d 1236 (11th Cir. 1999) (hereafter "*Adler III*"). The undersigned counsel of record then argued this case for the fourth time before a panel of twelve judges at the Eleventh Circuit Court of Appeals on October 19, 1999.

On March 15, 2000, the Eleventh Circuit Court of Appeals, sitting *en banc*, issued a 10 to 2 ruling upholding the

constitutionality of the policy. *See Adler v. Duval County Sch. Bd.*, 206 F.3d 1070 (11th Cir. 2000) (en banc) (hereafter "*Adler IV*"). The Court construed the appeal as an appeal of a final judgment strictly pertaining to the facial constitutionality of the Guidelines. *Id.* at 1073 n. 4. The Court found that the Guidelines, which permit graduating students to vote on whether to select a student to deliver a message wholly of her own choosing at the beginning or closing of a high school graduation ceremony, did not violate the Establishment Clause. The Court found the Guidelines were "perfectly consistent with the theme of neutrality in Establishment Clause jurisprudence." *Id.* at 1077. The Court noted that the Guidelines were "content-neutral, and allow an autonomous elected speaker, selected by her class, to deliver a religious or secular message on an equal basis." *Id.* Without deciding whether the Board had created a designated forum for student expression, the Court analogized the Guidelines to a line of open forum cases in which this Court held that "neutral secular policies that merely accommodate religion or individual free exercise rights do not amount to an unconstitutional state endorsement of religion." *Id.*

The *en banc* Court acknowledged that there was a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect. *Id.* at 1071. The Court distinguished the Guidelines from other graduation "prayer" cases. Unlike other graduation "prayer" policies that only allow the choice of prayer or no prayer, the Guidelines in question allow the choice of a message, the content of which is solely up to the student. *Id.* at 1078-79. The Court rejected the argument that the students become state actors as soon as they participate in the graduation ceremonies, noting that such an argument would raise more free expression concerns and likely run afoul of the Free Exercise and Free Speech Clauses. *Id.* at 1080-81. The *en banc* panel found that the Guidelines did not violate this Court's *Lemon* or *Lee* tests. *See Adler*, 206 F.3d at 1083-91.

Following the *en banc* decision of the Eleventh Circuit, the Plaintiffs filed a Petition for Writ of Certiorari to this

Court. On June 19, 2000, this Court decided the case of *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000). This Court then granted, vacated, and remanded the Eleventh Circuit's *en banc* decision for further consideration in light of *Santa Fe*. The Eleventh Circuit requested additional briefing on the matter, and then reissued its decision on May 11, 2001, in the case of *Adler v. Duval County School Board*, 250 F.3d 1330 (11th Cir. 2001) (en banc) (hereafter "*Adler V*"). After carefully reviewing this Court's opinion, the Court concluded that the *Santa Fe* decision "does not alter our previous *en banc* decision, and accordingly we reinstate that decision and the judgment in favor of Duval County." *Id.* at 1332. The Court noted that it was "impossible to say that the Duval County policy *on its face* violates the Establishment Clause without effectively banning *all* religious speech at school graduations, no matter how private the message or how divorced the content of the message may be from any state review..." *Id.* The Court found that the policy was facially neutral and that the facts of *Santa Fe* were fundamentally different "in many crucial respects from the facts of this case..." *Id.* at 1334.

SUMMARY OF ARGUMENT

This Court should deny the Petition for Writ of Certiorari because the *en banc* decisions do not conflict with this Court's opinion in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000). The facts of this case are fundamentally different than the facts in *Santa Fe*. The choice in *Santa Fe* was whether or not to have a prayer. The policy dictated the content of the message. The content of the message was therefore the choice of the school, and the only choice of the students was whether to have religious speech or no speech at all. In this case, the content of the message is not dictated by the school. The students choose whether to have a message, the content of which is solely up to the decision of the student speaker.

This case does not conflict with this Court's decision in *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000), or *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995).

There is no majoritarian vote on the content of a message, and therefore the majority has no power to override the voice of the minority. The only vote is whether to have a message, similar to voting whether to have a senior class president. The majority cannot control the content of the message, nor can the school dictate its content.

The Guidelines allow the students to decide whether to have a message at high school graduation, the content of which is left entirely to the student speakers. As such, the Guidelines have created a limited public forum for student speech. Within this forum the student volunteer can present a secular or religious message at his or her discretion. The school remains aloof and uninvolved. Since the Board has allowed the student speakers to select their own topics, including controversial subject matters, the Board has clearly created a limited public forum for student speech. Speakers can be excluded from this limited public forum only when the exclusion is necessary to serve a compelling interest.

The Guidelines do not violate the Establishment Clause. The Guidelines have a secular purpose of allowing secular and religious speech, and by allowing students to direct their high school graduation. Moreover, the Guidelines do not have the primary effect of advancing religion. Since the content of the message is left up to the individual student, the Board has no idea what message will be presented. The message can be secular, sacred, profane or profound. The Board remains aloof and uninvolved. The Board does not mandate the content of the message and is detached from the message.

The Guidelines are not coercive with regards to religious speech. The Board does not select the speaker or the content of the speech, and does not encourage a religious message. Clearly private religious speech has very little potential for coercion, and especially in the context where the Board remains aloof from the content of the message, there can be no governmental coercion.

Petitioners seek an injunction requiring the Board to censor student speech based solely on its viewpoint. Censorship

of student speech for religious viewpoint is unconstitutional in a designated public forum. If the Board did not create a designated public forum for student speech, an injunction censoring student religious speech would result in viewpoint censorship which is unconstitutional even in a non-public forum. Under the Guidelines the students can speak on any topic. However, an injunction censoring religious speech would allow the students to speak on any topic except from a religious viewpoint. Allowing an injunction to censor a religious viewpoint would violate this Court's recent decision in *Good News Club v. Milford Central School*, 121 S.Ct. 2093 (2001).

Requiring the Board to censor student messages by editing out religious content would violate the Establishment Clause by showing hostility toward religion and by creating excessive entanglement with religion. The Board would have to make doctrinal choices between what is and is not religious in order to censor the student's message.

REASONS FOR DENYING THE WRIT

While Respondents-Intervenors acknowledge that this case presents important and recurring questions regarding student speech at graduation ceremonies, Respondents-Intervenors respectfully request this Court to dent the Writ. If this Court grants the Writ, this Court should uphold the challenged Guidelines. The Guidelines are not about prayer but about speech. This case presents a facial challenge to the Guidelines. The facts in the *en banc* panel decisions below are unique. The Eleventh Circuit's decisions do not conflict with this Court's opinion in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000). The application of the policy in *Santa Fe* clearly dictated that the students had only one choice. That choice was to deliver a religious message or no message at all. Thus, the school dictated the content of the message through a surrogate. In this case, the school does not dictate the content of the message and has no authority over its content. The difference is fundamental and distinguishes the Eleventh Circuit's decisions from *Santa Fe*.

Moreover, this Court should deny the Petition for Writ of Certiorari because the Eleventh Circuit's decisions do not conflict with *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000) or *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995). Unlike these cases, there is no majoritarian vote whereby the majority is empowered to censor the viewpoint of the minority. Although there is a vote, the vote is similar to the election of a senior class president. The majority cannot vote on the content of the message, and are in fact barred by virtue of the policy from voting on content. The vote is only on whether to have a message, the content of which is solely up to the individual. This is similar to voting on a senior class president, the content of his or her speech being left solely up to the president. The majority cannot control the content nor can the school direct or control the content. Neither the school nor the students have the power to promote one speech over the other or to censor one viewpoint. This case is consistent with this Court's decisions in *Lemon v. Kurtzman*, 403 U.S. 602 (1971) and *Lee v. Weisman*, 505 U.S. 577 (1992).

This case is unique from any other graduation "prayer" case decided by any other Circuit. It, therefore, does not conflict with any other Circuit Court ruling. The Fifth Circuit in *Jones v. Clear Creek Independent School District*, 977 F.2d 963 (5th Cir. 1992), upheld a policy where the only choice was to pray or not to pray, and if the student sought to pray, the prayer had to be non-sectarian and non-proselytizing. The Guidelines are fundamentally different from the *Jones* policy. The Guidelines, unlike *Jones*, do not mandate prayer.

In *ACLU of New Jersey v. Black Horse Pike Regional Board of Education*, 84 F.3d 1471 (3rd Cir. 1996) (en banc), the Third Circuit found a school board policy unconstitutional that permitted the senior class to vote on whether to include a "prayer" at the high school graduation ceremonies. Again, the only choice in the Third Circuit case was to pray or not to pray.

In *Harris v. Joint School District No. 241*, 41 F.3d 447 (9th Cir. 1994), *vacated as moot*, 515 U.S. 1154 (1995), the Ninth Circuit found unconstitutional a similar policy.

However, this policy, unlike the one at issue here, provided that the only choice was to pray or not to pray. More consistent with the Guidelines is the Ninth Circuit's case of *Doe v. Madison School District No. 321*, 147 F.3d 832 (9th Cir. 1998), *vacated on other grounds*, 177 F.3d 789 (9th Cir. 1999) (en banc) (vacated for mootness because the student plaintiffs had already graduated). There the Ninth Circuit originally upheld a policy that allowed the top four graduating seniors to deliver non-censored messages where the student could choose to deliver an address, poem, reading, song, musical presentation, prayer, or any other pronouncement, the content of which the student alone controlled. The *Doe* case is similar to *Adler*. However, *Doe* was vacated on grounds of mootness following the graduation of the students. The only case with which the *Adler en banc* decisions potentially conflict is the Ninth Circuit decision in *Cole v. Oroville Union High School District*, 228 F.3d 1092 (9th Cir 2000). With respect to the student who was elected solely for the purpose of presenting a prayer, the Eleventh Circuit is not in conflict. However, with respect to the valedictorian who was elected using secular and neutral criteria but who chose to include a religious message, to that extent the *Cole* decision conflicts with *Adler*. However, it appears that the *Cole* decision actually conflicts with the Ninth Circuit decision in *Doe*. Thus the *Cole* decision appears to be merely an aberration.

The Eleventh Circuit has handed down consistent opinions in the *Adler* decisions and in the case of *Chandler v. Siegelman*, 230 F.3d 1313 (11th Cir. 2000).

This Writ should be denied because the case at issue is not at conflict with any other graduation "prayer" case. This case does not involve a graduation "prayer" policy, but instead involves a graduation "speech" policy, the content of which is solely the decision of the student. The vote is not whether to have a prayer, but whether to have a message, the content of which is solely within the discretion of the student. Therefore, this Court should deny the Writ. If this Court grants the Writ in order to resolve the important issues at stake, this Court should uphold the challenged Guidelines.

I.

THE ELEVENTH CIRCUIT'S DECISIONS DO NOT CONFLICT WITH ANY OPINION OF THE UNITED STATES SUPREME COURT.

The decisions in *Adler v. Duval County School Board*, 206 F.3d 1070 (11th Cir. 2000) (en banc) (*Adler IV*) and *Adler v. Duval County School Board*, 250 F.3d 1330 (11th Cir. 2001) (en banc) (*Adler V*), do not conflict with any decision of this Court. The *Adler* decisions are consistent with this Court's decision in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000). This case does not raise the concerns of a majoritarian election imposing viewpoint discrimination, as this Court was concerned with in *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000) or in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995). The decisions do not violate this Court's opinion in *Lee v. Weisman*, 505 U.S. 577 (1992), or in *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

A.

The *Adler* Decision Is Consistent With *Santa Fe*.

In *Santa Fe*, this Court held that a policy that permitted prayer only, given by a student who was not free to control the content of the speech, violated the Establishment Clause. *See Santa Fe*, 530 U.S. at 290. This Court held that the policy "allows only one student, the same student for the entire season, to give the invocation. The statement or invocation, moreover, is **subject to particular regulations that confine the content and topic of the student's message**." *Id.* at 303 (emphasis added). The key to understanding the holding of *Santa Fe* is found in the fact that the policy only allowed access to the forum for messages that were deemed "appropriate." "Santa Fe's student election system ensures that **only those messages deemed 'appropriate' under the district's policy may be delivered.**" *Id.* (emphasis added). The fatal flaw in *Santa Fe* was that the policy prescribed the **content** of the

message that was to be given and that a student was only allowed to give the particular message prescribed by the policy. The *Santa Fe* policy allowed the students access to the microphone only if the student speaker promised to *pray*. If the speaker did not want to *pray*, then the policy would not allow access to the microphone. In *Santa Fe*, if the student prayed, the student could speak; conversely, if the student chose not to pray, the student must remain silent.

This Court also placed great emphasis on the history of the policy which the Court believed indicated an intent on the part of the Santa Fe School District to preserve the practice of prayer before football games. *Id.* at 309. The Santa Fe School District viewed the policy as a continuation of previous policies which allowed prayer before football games. "Given these observations, and in light of the school's history of regular delivery of a student-led prayer at athletic events, it is reasonable to infer that the specific purpose of the policy was to preserve a popular 'state-sponsored religious practice.'" *Id.* This Court rejected the District's argument that this was not a "prayer only" policy and stated, "The District, nevertheless, asks us to pretend that we do not recognize what every Santa Fe High School student understands clearly - that this policy is about prayer. ... We refuse to turn a blind eye to the context in which this policy arose, and that context quells any doubt that this policy was implemented with the purpose of endorsing school prayer." *Id.* at 315.

The holding in *Santa Fe* is heavily fact-dependent. This Court denied that its holding had broad implications beyond the specific factual context of the case. *See Id.* at 304 n.15 (stating that there is an "obvious distinction between this case and the typical election of a 'student body president, or even a newly elected prom king or queen.'"); *Id.* at 316 n.23 (stating that the holding did not invalidate all student elections).

The *Adler* court noted that the *Santa Fe* decision relied in substantial part on two facts: (1) the speech was subject to particular regulations that confined the content and topic of the student message, and (2) the *Santa Fe* policy by its terms invited and encouraged religious messages. *Adler*, 250 F.3d at

1336. The Guidelines differ in several respects. First, the Guidelines do not contain any restriction on the identity of the student speaker or the content of the message. School officials are forbidden from reviewing the content of the message and denied the opportunity to censor the message. *Id.* at 1336-1337. Second, the Guidelines do not by their terms invite or encourage religious messages. *Id.* at 1337. Unlike the Santa Fe policy which expressed a clear preference for religious messages, the Guidelines express no preference. The Santa Fe policy made it virtually impossible for the student election to be a referendum on anything other than prayer. In contrast, the Guidelines allow a vote only on whether a message is to be delivered, and if so, which student is to deliver a message. In *Adler*, the content of the message is not "preordained" and instead reflects the uncensored and "wholly unreviewable decision of a single student speaker." *Adler*, 250 F.3d at 1339. This led the *Adler* court to observe that "the differences between this case and *Santa Fe* are substantial and material." *Id.* at 1340.

Adler noted that this Court's decision in *Santa Fe* "did not rule that an election process itself is always incompatible with the Establishment Clause." *Adler*, 250 F.3d at 1340-1341. Nor did this Court in *Santa Fe* rule that merely because speech occurred on government property, it was automatically transformed into government speech. "What turns private speech into state speech in this context is, above all, the additional element of state control over the content of the message." *Id.* at 1341. The Guidelines eliminate all state control over the content of the message. Therefore, the *Adler* case does not conflict with *Santa Fe*.

B.

The Guidelines Do Not Substitute Majority Determinations For Viewpoint Neutrality.

The Guidelines do not substitute majority determinations for viewpoint neutrality. In *Southworth*, this Court was concerned that a student referendum could result in viewpoint discrimination. 529 U.S. at 235. This Court did not find that

the student referendum in *Southworth* in fact violated viewpoint neutrality. The case was remanded for further consideration.

In *Rosenberger*, this Court found that when the government follows neutral criteria and administers policies evenhandedly, there is no danger in violating viewpoint neutrality. 515 U.S. at 839.

The Guidelines do not substitute majoritarian determinations for viewpoint neutrality. The Eleventh Circuit noted, "It cannot plausibly be argued that *on its face*, the Duval County policy calls for a student vote on whether to mandate the inclusion of prayer in a graduation ceremony." *Adler*, 250 F.3d at 1338.

> The Duval County policy, unlike the Santa Fe policy, does not subject the issue of prayer to an up-or-down vote; students do *not* vote on whether prayer, or its equivalent, should be included in graduation ceremonies. Rather, students vote on two questions that do not expressly or inherently concern prayer: (1) whether to permit a student "message" during the ceremony, and (2) if so, which student is to deliver the message.

Id.

The *Adler* court noted that the record did not support a finding that the majority imposed religion on the minority. In seven of the seventeen instances reflected in the record, "students voted for no message at all or for a student speaker who subsequently delivered an entirely secular message." *Id.* at 1339. In contrast, *Santa Fe* was concerned that "the majoritarian process implemented by the District guarantees, by definition, that minority candidates will never prevail and that their views will be effectively silenced." 530 U.S. at 304. The same cannot be said for a facial challenge against the Guidelines, and therefore the *Adler* opinion does not conflict with any decision of this Court.

C.

The Guidelines Allowing Uncensored Student Messages Do Not Violate The Establishment Clause.

1. The Guidelines Do Not Violate Lemon v. Kurtzman.

The *Lemon* test states that a government regulation must have a secular purpose, its principal or primary effect must not be to endorse or denigrate religion, and it must not foster excessive entanglement with religion. *See Lemon*, 403 U.S. at 612-13. The Guidelines do not violate the *Lemon* test.

a. The Purpose Of The Guidelines Is Secular.

The *en banc* panel of the Eleventh Circuit found that the Guidelines have a secular purpose of affording graduating students an opportunity to direct their own graduation ceremony by selecting a student speaker, by allowing students to solemnize graduation, and by allowing free speech on any topic. *See Adler*, 250 F.3d at 1342.

The Guidelines have a secular purpose and are neutral toward all student speech. An open forum policy promoting non-discrimination constitutes a valid secular purpose. *See Capitol Square Review Bd. v. Pinette*, 515 U.S. 753 (1995); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Board. of Educ. of Westside Community Sch. v. Mergens*, 406 U.S. 226 (1990); *Widmar v. Vincent*, 454 U.S. 263 (1981). The Establishment Clause is not implicated by treating all speech equally.

This first prong of the *Lemon* test "aims at preventing the relevant decision maker from abandoning neutrality and acting with intent of promoting a particular point of view in religious matters." *Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints v. Amos*, 483 U.S. 327, 335 (1987).

In *Doe v. Madison School District No. 321*, 147 F.3d 832 (9th Cir. 1998), *vacated as moot*,177 F.3d 789 (9th Cir. 1999)(en banc), the Ninth Circuit affirmed a decision which found that a graduation policy "was motivated, at least in part, by a number of secular purposes, including a desire to grant top students the autonomy to deliver an uncensored speech... unwilling to trivialize the importance of bestowing responsibility on young adults." 147 F.3d at 837. Like this case, in *Doe* the policy simply allowed a student wishing to engage in sectarian or non-sectarian speech to do so without interference or promotion by the school.

> We conclude that the District's graduation policy survives the *Lemon* test. On its face, the policy has a secular purpose, its primary effect is not the advancement of religion, and it does not excessively entangle church and state... The significant control exerted by the school on the religious contents of the graduation program is missing. Indeed, it is the absence of this control which saves the graduation policy at issue from facial constitutional invalidation.

Id. at 838.

b. The Guidelines Do Not Have The Primary Effect Of Advancing Or Endorsing Religion.

The Guidelines evince nothing more than accommodation of the student's right to free speech. The school does not pre-review or pre-screen the content of the message. The Board has no idea what the student will say before the student gets up and delivers his or her message. The Guidelines allow the school to remain neutral toward all speech, secular and religious.

An injunction against the Guidelines would require the government to abandon its neutral stance toward religion and become the final arbiter of what may or may not be considered religious. Such a position would inevitably lead to hostility towards religion rather than a position of neutrality as mandated

by the First Amendment. An injunction would place the government in the position of requiring the students to speak only the religious thoughts that government wants them to speak.

The *en banc* panel of the Eleventh Circuit found that the Guidelines do not have the primary effect of advancing religion because the Guidelines are content-neutral and allow a student message on any topic of the student's choice. *See Adler*, 250 F.3d at 1337.

The Guidelines "do not confer any imprimatur of state approval on religious sects or practices." *Widmar*, 454 U.S. at 274. Most importantly, "the failure to censor is not synonymous with endorsement." *Mergens*, 496 U.S. at 245. "There is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Id.*

It is clear that the Guidelines do not have the primary effect of advancing religion. It is true that the government may not delegate to a private citizen that which it may not do itself, *see Evans v. Newton*, 382 U.S. 296 (1966), but that is not the case here. In this case, school officials have no control over the content of what the student will say, or whether a student will say anything at all. The Board does not have control over who will give the student message. The Guidelines do not mandate prayer or any other speech for that matter, and thus, there is no government delegation in this case. School officials do not supervise the speech of the students.

This Court has stated, "Our precedents plainly contemplate that on occasion some advancement of religion will result from governmental action." *Lynch v. Donnely*, 465 U.S. 668, 683 (1984). "Not every law that confers an 'indirect' 'remote,' or 'incidental' benefit upon [religion] is, for that reason alone, constitutionally invalid." *Committee for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 771 (1973). To require the government to remove any vestiges of religion from public life would violate the Establishment

Clause.

> [The] exclusion of religious ideas, symbols, and voices marginalizes religion... Silence about a subject conveys a powerful message. When the public sphere is open to ideas and symbols representing nonreligious viewpoints, culture, and ideological commitment, to exclude all those whose basis is "religious" would profoundly distort public culture.

Mitch McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 189 (Winter 1992). In this case, an injunction requiring the government to censor out religious messages from student speech sends a message of hostility forbidden by the Establishment Clause.

c. The Guidelines Do Not Excessively Entangle The Government With Religion.

The Guidelines do not result in excessive entanglement of government with religion. In this case, government involvement is non-existent. The government has no control over who will give the message or what will be said. School officials do not supervise any aspect of the student message. A neutral policy granting students the right to free speech does not coerce religious conformance nor create excessive entanglement because it precludes the state from making religion-based inquiries.

The *en banc* panel below found that the Guidelines do not excessively entangle the Board with religion because the Guidelines remain facially neutral with respect to religion.

The Guidelines insulate the government from the necessity of scrutinizing the content of the student speech. The Guidelines avoid the need for the state to make religion-based exclusionary judgments. The Guidelines forbid entanglement by stating ***"the content of the message shall be prepared by the student volunteer"***. This Court has stated that the government would run a greater risk of excessive entanglement by

monitoring and censoring religious speech. *See Widmar*, 454 U.S. at 263. If school officials censored religious speech, they would certainly create excessive entanglement by excluding certain speech on the ground that it is religious. This Court has stated:

> We agree . . . that the University would risk greater "entanglement" by attempting to enforce its exclusion of "religious worship" and "religious speech". Initially, the University would need to determine which words and activities fall within "religious worship and religious teaching." This alone could prove "an impossible task in an age where many and various beliefs meet the constitutional definition of religion."

Widmar, 454 U.S. at 272 n.11. "It is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment." *O'Hair v. Andrus*, 613 F.2d 931, 936 (D.C. Cir. 1979). An anti-religious censorship pen will lead to excessive entanglement of government with religion.

It is unconstitutional to distinguish between various forms of religious speech and non-religious speech.

> Merely to draw the distinction would require the University -- and ultimately the courts -- to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in the manner forbidden by our cases.

Widmar, 454 U.S. at 269 n.6 (citations omitted).

As Justice Souter has remarked, it is hard to "imagine a subject less amenable for the competence of the Federal Judiciary, or more deliberately to be avoided where possible"

than determinations about the religious content of speech. *Lee*, 505 U.S. 616-17 (Souter, J. concurring). *See also Amos*, 483 U.S. at 336 (it is a significant burden to require a religious person or organization "to predict which of its activities a secular court will consider religious"). The Guidelines do not excessively entangle government with religion. An injunction requiring the Board to appoint a bureaucratic censor whose job is to strike through any word deemed religious in a student's speech would create a tangled web between church and state.

2. The Guidelines Do Not Violate Lee v. Weisman.

This Court recognized that,

> *at graduation time* and throughout the course of the educational process, ***there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students.***

Lee, 505 U.S. at 598-599 (emphasis added).

This Court has also stated that government coerces religious belief when the government directs a formal religious exercise by mandating prayer, choosing a clergy for the sole purpose of prayer, and providing guidelines on how to deliver a non-sectarian, non-proselytizing prayer. *See Lee*, 505 U.S. at 577.

Under the facts of *Lee*, this Court found coercion because the school (1) decided that prayer *should* be given, (2) selected a religious speaker to give the prayer, and (3) gave the religious speaker guidelines on how to give a non-sectarian, non-proselytizing prayer. *See Lee*, 505 U.S. at 587. In *Lee*, the "degree of school involvement" made it clear that the graduation prayers bore the imprint of the state. *Id.* at 590. This Court limited *Lee* to its specific facts. *Id.* at 599. The key to the Court's holding in *Lee* was the fact that it was the ***school*** which coerced the students to participate in a religious exercise. In this case, the Guidelines expressly prohibit

involvement from the school in the entire process of selecting the student to deliver the message and in what that student will say. It is impossible under these Guidelines to find that the ***state*** is coercing a religious exercise. This state involvement in *Lee* is simply not present in the case at bar. The government is in no way mandating prayer, or telling the students how to pray, or that they must pray at all. The government is simply allowing the students to exercise their right to free speech. In *Lee*, Justice Souter stated:

> If the state had chosen its graduation day speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message, it would have been harder to attribute an endorsement of religion to the state. But that is not our case.

Lee, 505 U.S. at 630 n.8 (Souter, J., concurring).

The *en banc* panel below stated that it was clear that the issue of the selection of the messenger and the content of the message, as found problematic in *Lee*, was not present here. A graduation free of all religious expression, compelled by the school's sponsorship of the event, is not required by the Establishment Clause. The *Adler* Court found no coercion in this case because "neither the Duval County schools nor the graduating senior classes even decide if a religious prayer or message will be delivered, let alone 'require' or 'coerce' the student audience to participate in any privately-crafted message." 206 F.3d at 1083 (*Adler IV*). While ten of the graduation messages delivered pursuant to the Guidelines involved some sort of religious content, the other seven Duval County graduations either had no student message or a wholly secular message. No religious result is preordained under the policy and consequently, no coercion exists. *Id.* at 1084.

There is simply no coercion present in the Guidelines because the only thing the Guidelines accomplish is to allow private, student-initiated speech. Such speech cannot constitute governmental coercion of religious belief. The Guidelines

present a different set of facts than *Lee*, and do not result in governmental coercion of religious belief.

II.

THE ELEVENTH CIRCUIT DECISIONS DO NOT CONFLICT WITH OTHER FEDERAL CIRCUITS.

After reviewing the other federal circuit cases involving student-led, student-initiated prayer at graduation, the Eleventh Circuit observed: "All of these cases involve direct student plebiscites on graduation prayer." *Adler v. Duval County Sch. Bd.*, 206 F.3d 1070, 1079 n.7 (11th Cir. 2000) (en banc) (*Adler IV*), *vacated and remanded*, 531 U.S. 801 (2000), *opinion reinstated*, 250 F.3d 1330 (11th Cir. 2001) (en banc) (*Adler V*).

The Fifth Circuit in *Jones v. Clear Creek Independent School District*, 977 F.2d 963 (5th Cir. 1992), upheld a policy which permitted students to vote directly on whether to have a prayer at graduation. Although the Third and Ninth Circuits have come to an opposite conclusion, there is a fundamental difference between these two circuits and the Eleventh Circuit.

In *ACLU of New Jersey v. Black Horse Pike Regional Board of Education*, 84 F.3d 1471 (3rd Cir. 1996) (en banc), the Third Circuit found a school board policy unconstitutional that permitted the senior class to vote on whether to include a "prayer" at graduation. The Third Circuit case reviewed a "prayer only" policy where the only choice provided to the students was to pray or not to pray. Under the policy, the government dictated the religious content of the message. If the message contained no religious content, then there would be no message. The message was permitted only on the basis that its content included prayer. The students had no choice in the content of the message.

In *Harris v. Joint School District No. 241*, 41 F.3d 447 (9th Cir. 1994), *vacated as moot*, 515 U.S. 1154 (1995), the Ninth Circuit found unconstitutional a "prayer only" policy. Under the policy, "the relevant speakers are instructed to

pray." *Id.* at 456-57. If the students want to speak, they must speak religiously. More consistent with the Guidelines is the Ninth Circuit's case of *Doe v. Madison School District No. 321*, 147 F.3d 832 (9th Cir. 1998), *vacated on other grounds*, 177 F.3d 789 (9th Cir. 1999) (en banc). In *Doe*, the Ninth Circuit upheld a policy that allowed the top four graduating seniors to deliver a non-censored message of the students' choice. In this respect, the Ninth Circuit decision is similar to the *Adler* decision.

Admittedly, the Ninth Circuit has recently handed down a decision that seems inconsistent even within the same circuit. In *Cole v. Oroville Union High School District*, 228 F.3d 1092 (9th Cir. 2000), the Ninth Circuit ruled that a school district was correct in censoring a student who was selected by the class solely for the purpose of delivering a prayer at graduation. However, the *Cole* decision also upheld censorship of a valedictorian who was selected on neutral criteria but who decided to pray. This portion of the *Cole* decision is an aberration and does conflict with the Eleventh Circuit. In this respect, the *Cole* decision actually conflicts with the Ninth Circuit decision in *Doe*. Other than this aspect of the *Cole* decision, the *Adler* case does not conflict with the decision of any circuit.

III.

GRANTING AN INJUNCTION REQUIRING THE BOARD TO CENSOR RELIGIOUS VIEWPOINT IS UNCONSTITUTIONAL.

The Guidelines clearly create a designated public forum for student expression during graduation ceremonies. The Guidelines provide a forum for student-initiated, student-led messages during graduation, the content of which is under the sole discretion of the student. The student can give a secular or sacred message and may deliver profane or profound oratory. Under these circumstances, the Board has created a designated public forum for student-initiated speech. "To ascertain what limits, if any, may be placed on protected speech, [this Court has] often focused on the place of that speech, considering the

nature of the forum the speaker seeks to employ." *Frisby v. Schultz*, 487 U.S. 474, 479 (1988). *See also Heffron v. ISKCON*, 452 U.S. 640 (1981); *United States v. Kokinda*, 497 U.S. 720 (1990). "A public forum may be created for a limited purpose such as use by certain groups." *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 49 n.9 (1983). A designated or limited public forum is "created when the government opens property to the public for expressive activity." *Id.* "A limited public forum is a forum for certain groups of speakers or for the discussion of certain subjects." *Id.* at 591; *see also Widmar v. Vincent*, 454 U.S. 263 (1981); *City of Madison Joint Sch. Dist. v. Wisconsin Pub. Employment Relations Comm'n*, 429 U.S. 167 (1976). *See also Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 803 (1985). One factor is governmental intent. Courts have recognized that a designated public forum may be created during a graduation ceremony.

> ***If, for example, school officials have authorized students to choose which of them will speak, and have permitted those speakers to select their own topics, including controversial subject matters, then officials may have created a limited public forum.*** Not only would such a practice demonstrate an intent to foster public discourse, but it would avoid attaching the imprimatur of the school to the views expressed in the student's speeches.

Brody v. Spang, 957 F.2d 1108, 1120 (3rd Cir. 1992)(emphasis added); *see also Lundberg v. West Monona Community Sch. Dist.*, 731 F. Supp. 331 (N.D. Iowa 1989)(recognizing that a school can create a public forum during the graduation ceremony).

The Guidelines create a designated public forum during high school graduation. The Guidelines do not prescribe the content of speech. The students have full and unbridled discretion as to whether a message will be included at the event, and, if included, its content. A student wishing to engage in sectarian or non-sectarian speech can do so without interference

or promotion by the school. Because the Guidelines allow any student speech on any topic, they have created a designated public forum.

Although the *en banc* panel below did not reach the public forum analysis, the *Adler* court analogized the Guidelines "to a long line of open forum cases in which [this] Court has held that neutral secular policies that merely accommodate religion or individual free exercise rights do not amount to an unconstitutional state endorsement of religion." *Adler v. Duval County Sch. Bd.*, 206 F.3d 1070, 1077 (11th Cir. 2000) (en banc) (*Adler IV*), *vacated and remanded*, 531 U.S. 801 (2000), *opinion reinstated*, 250 F.3d 1330 (11th Cir. 2001) (en banc) (*Adler V*). The *en banc* panel stated that a policy which permits access to both religious and secular student groups or speech in a neutral manner does not violate the Establishment Clause. *Id.* (*citing Widmar v. Vincent*, 454 U.S. 263, 274 (1981)). The *en banc* panel also noted that this Court extended the free speech or open forum analysis to public secondary schools in *Board of Education of West Side Community Schools v. Mergens*, 496 U.S. 226 (1990). The *en banc* panel also correctly relied upon this Court's decision in *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753 (1995), and *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995). The *Adler* Court stated these cases "strongly suggest" that a policy, like the one at issue here, "which provides an opportunity for student-selected, student-initiated private expression through a neutral selection criterion, does not violate the Establishment Clause simply because the venue is equally available for religious or secular expression." *Adler*, 206 F.3d at 1078.

The Guidelines have created a designated public forum for student expressive activity during graduation ceremonies. Within this forum, the students are free to speak on any topic, secular or sacred, profane or profound. However, even if the Guidelines do not create a designated public forum for student expressive activity, the Petitioners' request for injunctive relief is nevertheless unconstitutional. This Court has stated that "the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on

an otherwise includable subject." *Cornelius*, 473 U.S. at 806.

"Granting only one student access to the stage at a time does not, of course, necessarily preclude a finding that a school has created a limited public forum." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 304 (2000). Under the Guidelines, more than one student is granted access to the stage at a time. The Guidelines allow for a message at the beginning and/or conclusion of the ceremony. Moreover, the Guidelines are district-wide, covering seventeen schools.

This Court reaffirmed "that speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint." *Good News Club v. Milford Cent. Sch.*, 121 S.Ct. 2093, 2102 (2001). If this Court were to grant the Petition for Writ of Certiorari and later reverse the Eleventh Circuit, the remedy would require an injunction against the Board to actively censor the religious viewpoint of student graduation speakers. Such a result runs contrary to this Court's decision in *Good News Club*.

In *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), this Court invalidated a school policy which excluded use of the facilities for religious purposes. The film was denied solely because of its religious viewpoint. "The principle that has emerged from our cases 'is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.'" *Id.* at 394 (*quoting City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)). This Court also ruled that the Establishment Clause is not implicated when property is used for religious purposes under an open access policy. *See Lamb's Chapel*, 508 U.S. at 394-395 (*citing Widmar*, 454 U.S. at 271).

The policy in *Lamb's Chapel* stated that the premises "shall not be used by any group for religious purposes." 508 U.S. at 387. Since the film series dealt with an otherwise includable or permissible topic, this Court found that the school unconstitutionally engaged in viewpoint discrimination by

prohibiting a religious viewpoint on a permissible topic.

Lamb's Chapel referred to the previous decision in *Widmar*, 454 U.S. at 263, thereby rejecting any Establishment Clause argument since the property also was used for secular purposes. *Lamb's Chapel*, 508 U.S. at 394-395.

In *Rosenberger*, the University of Virginia used student activity fees to fund a wide range of student newspapers but refused to fund a Christian student newspaper. This Court declared that the ***"government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."*** 515 U.S. at 829 (emphasis added)(citations omitted).

Viewpoint discrimination is "presumed impermissible when directed against speech otherwise within the forum's limitations." *Id.* at 830. This Court rejected the University's argument that it did not engage in viewpoint discrimination because the guidelines discriminated against an entire class of viewpoints. "It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint." *Id.* at 831. "The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them." *Id.* at 835.

This Court also rejected the University's Establishment Clause defense, stating, "**More than once** ***we have rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design."*** *Id.* at 839 (emphasis added)(citations omitted). This Court concluded: "It does not violate the Establishment Clause for a public university to grant access to its facilities on a religion-neutral basis to a wide spectrum of student groups, including groups that use meeting rooms for sectarian activities, accompanied by some devotional exercises." *Id.* at 842.

The *Adler* Court noted "a per se rule that all speech on a state-controlled platform is state speech, raises core free expression concerns and would likely run afoul of the Free Exercise and Free Speech Clauses." 206 F.3d at 1081 (*Adler IV*). The Court noted that even if the graduation ceremony is considered a non-public forum, "students still would possess free speech rights there." *Id.* The *Adler* Court noted that religion is a viewpoint and that student speakers would be expressing various viewpoints, including religious ones. To censor the religious viewpoint would violate the students' free speech rights even in a non-public forum. The *Adler* Court noted that "the Constitution does not prohibit the exercise of offensive speech at graduation ceremonies, religious or otherwise; it only prohibits state expressions of religion." *Id.*

An injunction in this case would necessarily be viewpoint-based. Petitioners do not seek the suppression of all speech -- only speech of a supposed "religious" viewpoint. An injunction restraining a "religious" viewpoint necessarily asks, "what is religious?" It is beyond dispute that Americans live in a religiously pluralistic society. Therefore, what may not be religious to one individual may be religious to another. Indeed, many religions refer to God differently. For the Islamic, God is "Allah", while for the Buddhist, God is "Buddha." Those of the animist religion believe God resides in certain animals while those of the New Age persuasion believe God resides in and around us like a "force." Secular Humanism, which this Court has defined as a religion, *see Torcaso v. Watkins*, 367 U.S. 488, 495 n.3 (1961), believes that humans are God. Courts have recognized this plurality of religion. *See O'Hair v. Andrus*, 613 F.2d 931, 935 n.19 (D.C. Cir. 1979). It is clear that granting an injunction proscribing "religious" speech would necessarily fail for want of a clear definition of the viewpoint. Is, "May the Force be with you," religious? This type of viewpoint-based restriction would be unduly broad in its scope. The student speech at issue in this case is student-initiated without any oversight by the Board. Student speech is constitutionally protected even in a non-public forum. An injunction requiring censorship of a religious viewpoint is clearly unconstitutional, even in a non-public forum.

CONCLUSION

For the foregoing reasons, this Court should deny the Writ. If this Court grants the Writ in order to resolve the important issues at stake, this Court should uphold the challenged Guidelines.

Respectfully submitted,

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